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Nos. 10-238 and 10-239

In the Supreme Court of the United States

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC, ET AL., PETITIONERS

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.

JOHN MCCOMISH, ET AL., PETITIONERS

v.

KEN BENNETT, IN HIS OFFICIAL CAPACITY AS ARIZONA SECRETARY OF STATE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the "matching funds" provisions of the Arizona Citizens Clean Elections Act violate the First Amendment.

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INTEREST OF THE UNITED STATES

This case presents the question whether Arizona's system of public financing for state elections violates the First Amendment. More specifically, petitioners contend that their own campaign-related speech is unconsti-

tutionally burdened because the amount of money the State provides to a publicly financed candidate depends in part on the amounts raised and spent by that candidate's privately financed opponent.

Congress has adopted systems of public financing for presidential primary and general elections. See Presidential Election Campaign Fund Act (Presidential Fund Act), 26 U.S.C. 9001 *et seq.*; Presidential Primary Matching Payment Account Act (Presidential Primary Act), 26 U.S.C. 9031 *et seq.* Like Arizona, Congress has adopted an optional public-financing system while separately limiting monetary contributions to candidates for federal office, see 2 U.S.C. 441a(a).

Although neither federal statute uses the sort of triggered "matching funds" that are the specific subject of this litigation, Congress has previously considered, and both Houses have previously passed, legislation to adopt such a mechanism. See 147 Cong. Rec. 4668 (2001) (S. Amend. 148, 107th Cong., 1st Sess. (2001) (§§ 503(c), 504(2), 505(b))); S. 3, 103d Cong., 1st Sess. § 101(a), sec. 503(b)-(d) (1993) (passed Senate); H.R. 3, 103d Cong., 1st Sess. § 121, secs. 601(d), 604(f) (1993) (passed House). In addition, other provisions of federal law have been the subject of claims like the plaintiffs' contention here that an alleged burden on First Amendent rights warrants strict scrutiny. The United States therefore has a significant interest in the resolution of the questions presented.

STATEMENT

Through the initiative process, Arizona's citizens have enacted the Citizens Clean Elections Act (Arizona Act or Act), Ariz. Rev. Stat. Ann. § 16-940 *et seq.* (West 2006 & Supp. 2010), a voluntary system of public finance-

ing in which candidates for state office may elect to participate. Petitioners argue that the Arizona Act's formula for allocating "matching funds" to publicly financed candidates, which considers the fundraising or spending of those candidates' opponents, violates the First Amendment. The district court permanently enjoined the matching-funds provision. Pet. App. 45-77.[1] The court of appeals reversed and held the matching-funds provision valid on its face. *Id.* at 1-44.

1. a. Any eligible candidate for Arizona state office may decide to participate in the Arizona Act's public-financing system. To be eligible, a candidate must raise a specified number of $5 contributions from eligible voters, see Ariz. Rev. Stat. Ann. §§ 16-946, 16-950 (West 2006 & Supp. 2010), and must agree to abide by certain limits that apply only to publicly financed candidates. A participating candidate must agree not to accept any campaign contributions (except for certain small contributions that may be raised during the qualifying period); not to spend more than $500 of his own money; and not to exceed the Arizona Act's spending limit for the relevant election. *Id.* § 16-941(A) (West Supp. 2010).

In return, the Act provides participating candidates with public funds to spend on their campaigns. The State disburses those funds in two steps. First, at the beginning of the election period, each candidate receives a lump sum that is the default spending limit for that election. Ariz. Rev. Stat. Ann. § 16-951(A)(1) and (C) (West 2006).[2] Second, during the election period, the

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 10-238.

[2] Candidates who are unopposed, or who run as independents and therefore do not compete in any primary election, receive lower amounts. Ariz. Rev. Stat. Ann. § 16-951(A)(2)-(3) and (D) (West 2006).

spending limit may be adjusted if candidates receive "matching funds." See *id.* § 16-952 (West Supp. 2010).

Matching funds are triggered when a privately financed candidate raises or spends more money on the election than the default sum allotted to publicly financed candidates.[3] Spending by independent groups may also trigger matching funds if it unambiguously supports or opposes a candidate. Once a privately financed candidate reaches the threshold, then for each additional $1 that he raises or spends (or that independent groups spend to support him or attack his opponents), the spending limit for publicly financed candidates is increased by $1 (minus a six-percent deduction corresponding to fundraising expenses) and each publicly financed candidate in the race receives an additional $1 in matching funds (minus six percent). Ariz. Rev. Stat. Ann. § 16-952(A)-(C) (West Supp. 2010).

Matching funds are also subject to an absolute cap. No matter how much money a privately financed candidate or independent group spends, matching funds cannot exceed two times the initial default spending limit for the relevant election. Ariz. Rev. Stat. Ann. § 16-952(E) (West Supp. 2010). Thus, the upper spending limit for any publicly financed candidate is three times the amount of the State's original lump-sum payment (*i.e.*, the original grant itself plus two times that amount in matching funds).

b. A candidate who does not wish to participate in the public financing system is not required to do so. A candidate who forgoes public financing may raise funds

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[3] In the primary election, matching funds are triggered by a privately financed candidate's expenditures; in the general election, by contributions he receives. Ariz. Rev. Stat. Ann. § 16-952(A)-(B) (West Supp. 2010).

from individuals and political committees (subject to statutory limits on contributions from any single source, Ariz. Rev. Stat. Ann. § 16-905 (West Supp. 2010)); he may spend unlimited amounts of his own money on his campaign; and his total campaign expenditures are not limited by law.

2. Petitioners are past, present, and future candidates for state office and political committees that make independent expenditures in state elections. Petitioners in No. 10-239 brought this action, arguing that the matching-funds provision violates the First Amendment. Petitioners in No. 10-238 intervened as plaintiffs. See Pet. App. 13-14. All petitioners contended that the matching-funds provision prevented or discouraged them from spending as much as they otherwise would against publicly financed opponents. See *id.* at 14-15.

3. The district court granted summary judgment for petitioners and enjoined the operation of the matching-funds provision. Pet. App. 45-78.

The district court stated that petitioners had presented only "vague" evidence that the Arizona Act burdened their First Amendment rights. Pet. App. 52.[4] The court understood petitioners to argue that their rights were burdened because, if they "spend as much as they wish," Arizona will give a corresponding amount of money to their publicly financed opponents. *Id.* at 63. The court stated that, given the First Amendment's purpose "to 'secure the widest possible dissemination of

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[4] Petitioner Martin, then the state treasurer, made admissions in his deposition that led the district court to conclude that matching funds had not been a "serious concern" in his campaigns. Pet. App. 56. Nor did the political-committee petitioners persuade the district court that they had ever been dissuaded by matching funds from spending money; the court identified a factual dispute on that point. *Id.* at 58-59.

information from diverse and antagonistic sources,' it seems illogical to conclude that the Act creating more speech is a constitutionally prohibited 'burden' on [petitioners]." *Id.* at 64 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 49 (1976) (per curiam)).

The district court nevertheless held the matching-funds provision unconstitutional under *Davis* v. *FEC*, 554 U.S. 724 (2008). The Court in *Davis* invalidated the "Millionaire's Amendment," 2 U.S.C. 441a-1(a), under which a candidate's decision to self-finance his campaign allowed his opponents (but not the self-financing candidate himself) to invoke a different, more permissive set of rules, including trebled contribution limits and unlimited party coordinated spending. 554 U.S. at 736-744. The district court concluded that petitioners "face a choice very similar to that faced in *Davis*" because they must either "abide by a limit on personal expenditures" or face "negative consequences" in the form of "having [their] opponent[s] receive additional funds." Pet. App. 65. The court applied strict scrutiny, see *id.* at 67, and concluded that the matching-funds provision is not narrowly tailored to advance a compelling interest, *id.* at 67-70. The court further held that the matching funds provision was not severable, *id.* at 71-74, and it enjoined the implementation of the Arizona Act in its entirety.

4. The court of appeals reversed. Pet. App. 1-44.

The court of appeals held that *Davis* was "easily and properly distinguished" and that petitioners had shown only an "indirect or minimal" burden on their speech. Pet. App. 24, 27. The court observed that none of the petitioners had "pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds." *Id.* at 29. The court concluded that the Arizona Act im

posed no significant burden on petitioners' exercise of constitutional rights because "the First Amendment includes 'no right to speak free from response.'" *Id.* at 30 (quoting *Daggett* v. *Commission on Governmental Ethics & Election Practices*, 205 F.3d 445, 464 (1st Cir. 2000)).

The court of appeals accordingly applied a form of intermediate scrutiny, and it rejected petitioners' constitutional challenge. Pet. App. 33-37. The court explained that "[t]he State has a sufficiently important interest in preventing corruption and the appearance of corruption," and that "Arizona has a long history of *quid pro quo* corruption." *Id.* at 33. The court concluded that the matching-funds provision bears a substantial relation to the State's anticorruption interest because "[i]n order to promote participation in the program, * * * the State must be able to ensure that participating candidates will be able to mount competitive campaigns, *no matter what the source of their opponent's funding*." *Id.* at 36. The court further explained that "if the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom." *Id.* at 37.

Judge Kleinfeld concurred. Pet. App. 38-44. He emphasized that providing public funds to participating candidates "imposes no contribution or spending limits" and therefore "does not restrict speech at all." *Id.* at 40. He explained that, although privately financed candidates may sometimes "make strategic decisions in response to the public funding scheme," that effect "is not a restriction on speech." *Ibid.*; see *id.* at 40-41 ("The kinds of strategic choices generated by the Arizona rules do not differ in kind from the choices presented to candidates by other election laws.").

SUMMARY OF ARGUMENT

I. The Arizona Act's matching-funds provision is not subject to strict scrutiny because that provision neither directly restricts, nor severely burdens, petitioners' own election-related expenditures. The government's discretion is at its height when it allocates its own funds. Petitioners contend that the matching-funds provision creates a disincentive to speak because privately financed candidates and their supporters may sometimes forgo particular expenditures in order to limit the resources available to their publicly financed opponents. This Court's decisions make clear, however, that any such disincentive is not the sort of severe burden that can trigger strict scrutiny.

Petitioners also argue that the matching-funds provision burdens or penalizes their own speech by treating that speech as a trigger for additional outlays to petitioners' publicly financed opponents. Petitioners acknowledge, however, that the Arizona Act would be constitutional if the State simply provided each participating candidate the maximum amount (*i.e.*, three times the amount of the initial grants available under current law) at the outset, without regard to the sums raised or spent by participants' privately financed opponents. Using the matching-funds mechanism instead of that more profligate approach both conserves state resources and reduces the incidence of financial disparities between publicly and privately financed candidates, without in any way increasing the burdens on privately financed candidates or their supporters.

Petitioners' reliance on *Davis* is misplaced. Under the statute (known as the "Millionaire's Amendment") at issue in *Davis*, a self-financing candidate's expenditure of specified amounts of personal funds triggered a regu-

latory framework under which the self-financing candidate was subject to much more stringent contribution limits than his opponent. Characterizing that disparate treatment of competing candidates as "unprecedented" (554 U.S. at 739) and "discriminatory" (*id.* at 740), the Court held that the Millionaire's Amendment unconstitutionally burdened the self-financing candidate's exercise of First Amendment rights. Under the Arizona Act, by contrast, petitioners' campaign spending simply triggers increased monetary outlays that, under petitioners' own theory, the State could have provided from the outset. And far from being the beneficiaries of a "discriminatory" regulatory framework, publicly financed Arizona candidates are subject to much more severe spending and fundraising restrictions than their privately financed opponents.

The Arizona Act's matching-funds mechanism is not analogous to compelled-speech laws that this Court has invalidated. Petitioners are not required to pay for, to disseminate, or to identify themselves with their opponents' messages.

II. The Arizona Act's matching-funds provision satisfies exacting scrutiny. This Court has recognized that voluntary public-financing programs are a constitutionally permissible means of preventing actual and apparent corruption of office-holders. That Arizona also limits contributions does not negate the possibility of such corruption. And by obviating the need for candidates to solicit donations to amass adequate resources under applicable contribution limits, public financing serves a further important interest by freeing office-holders to focus on issues of public concern.

The matching-funds mechanism provides a constitutionally permissible formula for determining how much

money each publicly financed candidate will receive. The State's public-financing scheme can attract candidates to participate, and thereby serve its important purposes, only if candidates have reasonable confidence that it will provide sufficient sums to run competitive campaigns. Although Arizona could invite widespread participation by providing very large grants to all qualifying applicants, that approach would waste public funds in races where such largesse is unnecessary to run an effective campaign. And while the State cannot restrict petitioners' expression in order to provide equality of opportunity to their competitors, the Arizona Act does not restrict petitioners' speech. In determining in advance how to calculate the amounts to be paid to candidates who choose to participate, Arizona can seek to approximate the sums raised and spent by participants' privately financed opponents.

ARGUMENT

The matching-funds provision of the Arizona Act is consistent with the First Amendment because it does not "abridg[e] the freedom of speech." This Court's precedents make clear that Arizona's provision of public funds to participating candidates does not, in and of itself, violate the First Amendment rights of candidates who choose to finance their own campaigns. A necessary component of any public-financing scheme is a formula to determine the amount of funds that each participating candidate will receive. The matching-funds provision is designed to create adequate incentives for candidates to choose public financing, thereby allowing the Act to achieve its important purposes, without wasting scarce public resources.

I. BECAUSE THE ARIZONA ACT DOES NOT SUBSTANTIALLY BURDEN PETITIONERS' ABILITY TO SPEND MONEY ON ELECTIONS, THE ACT IS REVIEWED UNDER THE "EXACTING SCRUTINY" STANDARD

Petitioners and their amici contend that strict scrutiny should apply because the Arizona Act "penalizes,"[5] "restrict[s],"[6] or "limit[s]"[7] the speech of candidates and independent groups. That premise is incorrect. The challenged provision does not limit the contributions that privately financed candidates can receive or the total amounts that such candidates or their supporters can spend on campaign-related speech. Petitioners nevertheless contend that the Act should be reviewed under the same stringent standard as an outright prohibition on spending. Petitioners' theory is that the Act "burdens" their speech by creating incentives for petitioners to forgo campaign-related activity in order to prevent additional matching funds from flowing to their opponents. The existence of that sort of strategic choice, however, does not constitute the kind of severe burden on constitutional rights that would trigger strict scrutiny.

A. The Arizona Act Does Not Restrict The Right To Make Campaign Expenditures

Under the Arizona Act, privately financed candidates and their independent supporters face no restrictions on how much money they can spend, when they can spend it, or (in the case of independent groups) how they must

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[5] AFEC Br. 28, 36; see McConnell Amicus Br. 10; McComish Br. 57 ("similar to the threat of a fine").

[6] AFEC Br. 26, 27, 35, 42.

[7] AFEC Br. 58; McComish Br. 37, 57; see McConnell Amicus Br. 4-5.

organize their operations in order to spend money on advocacy. All they must do to comply with the Act is provide disclosure, Ariz. Rev. Stat. Ann. §§ 16-941(B)(2) and (D), 16-948 (West 2006 & Supp. 2010), a requirement petitioners do not challenge.

The absence of *any* direct restriction on petitioners' own campaign-related spending is enough, by itself, to distinguish nearly all of the strict-scrutiny cases on which petitioners and their amici rely. Almost every one of this Court's cases applying strict scrutiny in the electoral context has involved an outright restriction. See, *e.g.*, *Citizens United* v. *FEC*, 130 S. Ct. 876, 897 (2010) (describing the statute as "an outright ban, backed by criminal sanctions"); *id.* at 917 (Roberts, C.J., concurring); *Randall* v. *Sorrell*, 548 U.S. 230, 245 (2006) (plurality opinion) ("dollar cap imposed upon a candidate's expenditures"); *id.* at 264 (Kennedy, J., concurring in the judgment); *id.* at 267 (Thomas, J., concurring in the judgment); *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223-225 (1989); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC* v. *National Conservative PAC*, 470 U.S. 480, 496 (1985) (*NCPAC*); *Brown* v. *Hartlage*, 456 U.S. 45, 53-54 (1982); *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978); *Buckley* v. *Valeo*, 424 U.S. 1, 39-59 (1976) (per curiam).

In each of those cases, the challenged restriction was subject to strict scrutiny because the direct result of the restriction was less speech. The Arizona Act, by contrast, leaves speech unrestricted and instead provides funding for *more* speech in response. See *Buckley*, 424 U.S. at 93 n.127 (public financing is one way of "providing financial assistance to the exercise of free speech"); cf. *Citizens United*, 130 S. Ct. at 911 ("[I]t is our law and

our tradition that more speech, not less, is the governing rule."). The contrast between this case and *NCPAC*, on which several amici rely, is instructive. The statute struck down in *NCPAC*, a provision of the Presidential Fund Act, tightly restricted independent expenditures supporting a publicly financed candidate for President. The Court applied strict scrutiny to the expenditure limit "to assure [the] unfettered exchange of ideas" in the electoral arena. 470 U.S. at 493 (brackets in original) (quoting *Buckley*, 424 U.S. at 14). The Arizona Act does not restrict the exchange of ideas but rather facilitates it. The Act does not limit the right of either privately funded candidates or independent groups to attack publicly funded candidates, but merely makes it possible for those publicly funded candidates to respond.

B. To Invoke Strict Scrutiny, Petitioners Must Show That The Arizona Act Severely Burdens Their First Amendment Rights

This Court has also applied strict scrutiny to a handful of electoral regulations that do not formally restrict the exercise of any right protected by the First Amendment, but that impose such a significant practical burden on the exercise of such rights as to be tantamount to an outright restriction. In each of those cases, however, the Court has cautioned that it will apply strict scrutiny only to regulations that directly, tangibly, and significantly burden the exercise of First Amendment freedoms. A mere "disincentive" to speech does not constitute such a burden. Statutes that create such disincentives are subject to less demanding scrutiny because they pose "a less substantial risk of excising certain ideas or viewpoints from the public dialogue." *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 642 (1994).

Petitioners' evidence in this case shows, at most, that petitioners have sometimes refrained from raising or spending money in order to avoid triggering payments of matching funds to opposing candidates. Petitioners have made that tactical choice because they prefer the situation in which both they and their opponents spend *less* to a situation in which both they and their opponents spend *more*.[8] Petitioners would of course prefer a regime under which they could spend additional sums while their publicly financed opponents received only the initial lump-sum state payments. Nothing in the First Amendment, however, entitles them to the benefits of that disparity.

1. Only a "severe" burden on the exercise of a constitutional right can trigger strict scrutiny

As this Court has long emphasized, not *every* regulation of the political process creates the sort of burden on constitutional rights that warrants strict scrutiny. Rather, that standard applies only to the most *substantial* burdens, whether on the right to free speech, the right to free association, or the right to vote. See, *e.g.*, *Clingman* v. *Beaver*, 544 U.S. 581, 592 (2005) ("[S]trict scrutiny is appropriate only if the burden is severe.").

This Court has applied that principle in numerous First Amendment contexts. See, *e.g.*, *Clingman*, 544

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[8] Several petitioners are current state officeholders or held state office at the time suit was filed. As this Court has noted, incumbents have natural advantages (such as name recognition) over challengers, and challengers generally need more money to prevail than incumbents do. See *Randall*, 548 U.S. at 256 (plurality opinion) (citing Norman J. Ornstein et al., *Vital Statistics on Congress 2001-2002*, at 87-96 (11th ed. 2002)). An incumbent may well prefer that both sides spend small amounts rather than large amounts for reasons that have nothing to do with any First Amendment burden that the Arizona Act may pose.

U.S. at 592; *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 452 (2008) (explaining that "[i]f a statute imposes only modest burdens" on associational rights, strict scrutiny does not apply); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358, 364 (1997). The few cases in which this Court has applied strict scrutiny based purely on a burden on First Amendment rights are those like *Davis* v. *FEC*, 554 U.S. 724 (2008), in which the burden was "unprecedented," "special," and "substantial" (see pp. 22-26, *infra*), or *California Democratic Party* v. *Jones*, 530 U.S. 567, 581-582 (2000), in which the Court "c[ould] think of no heavier burden" on associational rights than the law at issue.

Strict scrutiny is a demanding test, and this Court has recognized that it cannot be applied to *all* laws that affect the choices of voters, candidates, and parties. *Clingman*, 544 U.S. at 592. In particular, strict scrutiny is inappropriate if a burden, though direct and tangible, is merely an "ordinary" and "widespread" feature of the electoral system. *Id.* at 593. Thus, although a plaintiff may be concretely *affected* by rules that prevent him from voting in one party's primary while remaining registered with another party; giving his party's ballot line to another party's nominee; or casting his ballot for a write-in candidate, those regulations do not affect First Amendment rights to the severe degree that would warrant strict scrutiny. *Id.* at 592-593; *Timmons*, 520 U.S. at 358-359; *Burdick* v. *Takushi*, 504 U.S. 428, 432-434 (1992).

In *no* previous case, moreover, has this Court deemed the expenditure of public funds to be a constitutionally significant burden on someone who did not want government money for himself but opposed the provi-

sion of such funds to others. To the contrary, the government generally enjoys the *greatest* discretion when it exercises the power to spend its own funds as it sees fit. See, *e.g.*, *NEA* v. *Finley*, 524 U.S. 569, 587-588 (1998); *id.* at 599 (Scalia, J., concurring in the judgment) (characterizing "the distinction between 'abridging' speech and funding it as a fundamental divide"); *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 545-546 (1983); cf., *e.g.*, *NCPAC*, 470 U.S. at 496 (noting, in a case involving independent expenditures concerning a publicly financed candidate, that "[t]he restriction involved here is not merely an effort by the Government to regulate the use of its own property"). The Court's reluctance to subject commonplace and important government electoral regulation to the "compelling interest" and "narrow tailoring" requirements of strict scrutiny, see *Clingman*, 544 U.S. at 593, applies with all the more force in a case like this one, for two reasons: First, the allegedly burdensome state law does not regulate private conduct at all, but simply establishes a spending program in which participation is wholly voluntary. Second, petitioners do not challenge the denial (or potential denial) of public funds to themselves, see, *e.g.*, *Finley*, 524 U.S. at 577; *Rosenberger* v. *Rector*, 515 U.S. 819, 825-828 (1995), but instead claim injury from the government's provision of funds to others.

2. A state law does not impose a "severe" burden on constitutionally protected rights simply because it creates a reason not to exercise them

A plaintiff cannot show that a law imposes a "severe" burden merely by averring that he would prefer to refrain from exercising his rights altogether than to exer-

cise them subject to the law. This Court has long made that point clear, including twice just last Term.

a. In upholding the public-financing scheme that applies to presidential elections, the Court in *Buckley* stated that "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." 424 U.S. at 57 n.65. The Court reached that conclusion even though it held that *unwilling* candidates may not constitutionally be subjected to limits on total campaign spending. See *id.* at 54-58. The Court explained that "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n.65. That analysis makes clear that a statutory disincentive to the exercise of First Amendment rights cannot properly be equated with a direct ban or restriction on such freedoms.

b. More recently, in *Citizens United*, the plaintiff and numerous amici—including several entities that advocate the application of strict scrutiny in this case—argued that disclosure requirements should be subject to strict scrutiny. They contended that requiring a person or group to disclose its identity when it funds an electioneering communication is a severe burden on the right to free speech. Appellant's Reply Br. at 28-30, *Citizens United*, *supra* (No. 08-205); Inst. for Justice Amicus Br. at 5-6, 8-12, 18-25, *Citizens United*, *supra* (No. 08-205); Cato Inst. Amicus Br. at 16-26, *Citizens United*, *supra* (No. 08-205).

This Court squarely rejected those arguments. It reiterated that if a challenged requirement "do[es] not prevent anyone from speaking," it is not ordinarily sub-

ject to the same level of scrutiny as an outright regulation of speech. 130 S. Ct. at 914 (quoting *McConnell* v. *FEC*, 540 U.S. 93, 201 (2003)). The Court also did not agree that the potential deterrent effect of the challenged disclosure requirement —*i.e.*, the possibility that some persons would forgo campaign-related speech altogether rather than divulge their identities to the public—warranted the application of strict scrutiny. Rather, the Court upheld the disclosure requirements under a less demanding standard of review, *id.* at 914, 916, and in so doing reaffirmed a line of cases extending back to *Buckley*, *supra*. In *Buckley* the Court recognized that "[i]t is undoubtedly true that public disclosure of contributions to campaigns and political parties will deter some individuals who otherwise might contribute," 424 U.S. at 68, or who otherwise might make expenditures, see *id.* at 75. The Court nonetheless applied the lower standard of "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).

Similar arguments in favor of strict scrutiny were made in *Doe* v. *Reed*, 130 S. Ct. 2811 (2010), again by, *inter alia*, the same entities that urge strict scrutiny here. Those litigants contended that signing a petition to hold a popular referendum on a legislative enactment was protected First Amendment activity, and that a statute mandating disclosure of petition-signers' names imposed a severe burden warranting strict scrutiny. See Pet. Br. at 29-31, 40-48, *Doe*, *supra* (No. 09-559); Inst. for Justice Amicus Br. at 10-17, *Doe*, *supra* (No. 09-559); Cato Inst. Amicus Br. at 2, 6-10, *Doe*, *supra* (No. 09-559). In rejecting that contention, the Court reiterated

that disclosure requirements "may burden the ability to speak, but they . . . do not prevent anyone from speaking." 130 S. Ct. at 2818 (quoting *Citizens United*, 130 S. Ct. at 914). Because "only modest burdens attend the disclosure of a typical petition," the Court applied exacting scrutiny rather than strict scrutiny, and it upheld the disclosure statute against the plaintiffs' facial challenge. *Id.* at 2818, 2821.[9]

c. In other First Amendment contexts as well, the Court has recognized that a mere disincentive is not sufficient to create a constitutionally cognizable burden that warrants strict scrutiny. "There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity [that is] consonant with legislative policy." *Rust*, 500 U.S. at 193 (quoting *Maher* v. *Roe*, 432 U.S. 464, 475 (1977)). By making public funds available, Arizona seeks to encourage candidates to abide by the fundraising and spending limits that apply to participating candidates. But neither the Arizona Act as a whole, nor its matching-funds provision in particular, restricts the speech of candidates who decline to participate.

C. The Arizona Act Does Not Impose Any Severe Burden On Petitioners

Under the foregoing principles, the Arizona Act does not impose any severe burden on petitioners' exercise of their First Amendment rights. Rather, petitioners remain free to exercise those rights to their fullest extent.

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[9] In both *Doe* and *Citizens United*, the Court left open the possibility that successful as-applied challenges might be brought by individuals or groups who would be susceptible to unusually severe harm ("threats, harassment, or reprisals") from disclosure. *Doe*, 130 S. Ct. at 2821 (citation omitted); *Citizens United*, 130 S. Ct. at 914, 916.

Under the Arizona Act, the only consequence of petitioners' expenditures is that a somewhat greater amount of state funds may be provided to petitioners' publicly financed opponents. Petitioners' own speech, however, is neither negated nor penalized by counter-speech from their opponents. Indeed, petitioners concede (McComish Br. 84-85) that the Arizona Act would be constitutional if *all* publicly financed candidates for state office were given three times the amount of the current default spending limits.

Petitioners' constitutional objection to the Arizona Act's matching-funds provision is that the amount of state money provided to any particular publicly financed candidate depends in part on the amounts raised and spent by the candidate's opponents. Petitioners contend that the matching-funds approach has a "punitive and deterrent effect" because their own exercise of First Amendment rights "help[s] disseminate hostile speech." McComish Br. 84. But Arizona does not take money or other resources from petitioners to fund or facilitate their opponents' speech; it does not require petitioners to include their opponents' messages alongside their own; and it does not give their opponents' messages any superior treatment. Rather, the State merely adjusts the amounts paid to publicly financed candidates to increase the likelihood that those sums will be sufficient to run a competitive campaign and, thus, to attract candidates to choose the public-financing system at the outset. And unlike the Millionaire's Amendment that was struck down in *Davis*, the Arizona Act does not subject privately financed candidates to a discriminatory regulatory regime. Because the result—more speech and more competition—is wholly consonant with First Amendment values, see *Buckley*, 424 U.S. at 92-93, the

matching-funds provision is not subject to strict scrutiny.

1. The Act does not burden petitioners by giving a "fundraising advantage" to their opponents

The *dollar amount* of matching funds that a publicly financed candidate receives does not burden that candidate's opponents. Petitioners concede (McComish Br. 84-85) that the State could constitutionally provide every publicly financed candidate the maximum amount of funding (*i.e.*, three times the amount of the initial lump-sum payment) that is available under current law. Accord Pet. App. 64 (district court recognizes that, "[i]f the Act provided for a single lump sum award, instead of incremental awards, the law would fall squarely within the regime blessed in *Buckley* and reaffirmed in *Davis*"). For example, the initial lump-sum payment to a publicly financed candidate in the Arizona gubernatorial election is approximately $1.06 million, and the maximum amount available is approximately $3.18 million. State Resps. Br. 6 n.3. The Arizona Act would not be subject to any colorable constitutional objection if every qualifying publicly financed gubernatorial candidate received $3.18 million for the general election, even if that amount were larger than a privately financed opponent was able to raise through contributions or self-funding.

Petitioners' repeated assertions that the Act gives "fundraising advantages" to their political opponents (AFEC Br. 27-32; McComish Br. 48-49, 88) are therefore doubly misconceived. This Court in *Buckley* upheld public financing even while recognizing that some publicly financed candidates would receive larger sums than some privately financed candidates could hope to raise.

424 U.S. at 94-95 & n.128, 98-99, 101-102. And the particular feature of the Arizona Act that petitioners challenge—*i.e.*, the matching-funds formula for calculating the payments that participating candidates will receive—is designed to *reduce* the incidence of disparities between privately and publicly financed candidates.

2. Matching funds do not impose any discriminatory burden on petitioners

In *Davis*, this Court held that the Millionaire's Amendment "substantially burden[ed]" the rights of a candidate who wished to spend a large sum of personal funds on his campaign because Davis's self-financing would trigger "discriminatory" contribution and party-coordination limits favoring his opponent. 554 U.S. at 740. The Arizona Act creates no such invidious discrimination between similarly situated candidates. Petitioners' reliance on *Davis* therefore is misplaced.

The Millionaire's Amendment did not involve public financing. Rather, it provided that if a candidate contributed a large amount of personal funds to his campaign, any competing candidate who had contributed no personal funds (or a much smaller amount) could benefit from a special set of campaign-finance rules.[10] The competing candidate could accept contributions of up to $6900 per individual donor; the self-financing candidate's limit was $2300 per individual donor. The com-

[10] The Millionaire's Amendment was triggered when the "opposition personal funds amount" (OPFA) exceeded $350,000. "The OPFA, in simple terms, [was] a statistic that compare[d] the expenditure of personal funds by competing candidates and also t[ook] into account to some degree certain other fundraising." *Davis*, 554 U.S. at 729; see *id.* at 729 n.5. Once the competing candidate had raised enough money under the Millionaire's Amendment to equal the OPFA, the special rules ceased to apply. *Id.* at 729.

peting candidate could accept contributions from individuals who had already made the maximum aggregate campaign contributions that federal law permits; the self-financing candidate could not. And the competing candidate could benefit from an unlimited amount of coordinated spending by his political party; the self-financing candidate could accept no more than $40,900 in such spending. See *Davis*, 554 U.S. at 728-729.

The plaintiff in *Davis* was a self-financing candidate whose campaign spending had triggered the Millionaire's Amendment. Although his opponent had chosen not to take advantage of the special contribution and coordinated-spending limits, this Court held that Davis had suffered a cognizable injury; that his injury constituted a "substantial burden" on his First Amendment rights; and that strict scrutiny therefore applied. 554 U.S. at 734, 740.

The injury the Court identified was not the mere fact that Davis's own self-financing triggered new contribution limits that allowed his opponent to raise more money. "If [the Millionaire's Amendment] simply raised the contribution limits for all candidates," the Court stated, "Davis' argument would plainly fail" because there is no constitutional right "to restrict an opponent's fundraising." 554 U.S. at 737. The Court thus recognized that Congress could permissibly have made Davis's electoral spending the trigger for modifications to the generally-applicable campaign-finance regime, even if Davis preferred to self-finance his campaign while leaving the lower contribution limits in place.

The defect in the Millionaire's Amendment, the Court explained, was that a candidate who "engage[s] in unfettered political speech" must face the "unprecedented penalty" of a "discriminatory" set of fundraising

limitations. 554 U.S. at 739. The Court emphasized that it had "never upheld the constitutionality of a law that imposes different contribution limits for candidates who are competing against each other." *Id.* at 738. The Court concluded that the Millionaire's Amendment impermissibly burdened Davis's exercise of the constitutional right to self-finance because Davis was required either to "abide by a limit on personal expenditures or" to suffer the "activation of a scheme of discriminatory contribution limits." *Id.* at 740.[11]

Thus, the thrust of the *Davis* Court's reasoning was that, given the constitutionally disfavored nature of any campaign-finance regime in which opposing candidates in the same election are subject to different contribution limits, Congress could not require candidates who otherwise would self-finance to forgo their exercise of constitutional rights in order to avoid that "discriminatory" regulatory framework. Under the Arizona Act, by contrast, petitioners' electoral spending simply triggers increased monetary outlays that, on petitioners' own theory, the State could have provided from the outset. The feature of the Millionaire's Amendment that the *Davis* Court found decisive—*i.e.*, its treatment of protected speech as the trigger for regulation that would

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[11] Similarly, in *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), the Court applied strict scrutiny to New York's "Son of Sam" law because the law imposed "discriminatory," "content-based burdens." *Id.* at 116; see *id.* at 115-118. Petitioners rely (AFEC Br. 28) on *Simon & Schuster* for the proposition that a disincentive is a severe burden, but the Court in that case considered only a "*content based* financial disincentive[]" to engage in speech on a particular subject. 502 U.S. at 117 (emphasis added). By contrast, the Arizona Act is content-neutral because participation is based entirely on neutral criteria and even critics of public financing (such as petitioner Murphy, J.A. 674) may participate.

otherwise be constitutionally infirm—is thus absent here. And the State's decision to conserve scarce public resources, by mandating the higher outlays only in those races where they are most needed, does not render the Act unconstitutional. See p. 21, *supra*; p. 33, *infra*.

Far from being the beneficiaries of a "discrimina tory" regulatory framework, publicly financed Arizona candidates are subject to much more severe spending and fundraising restrictions than their privately financed opponents. Cf. *Buckley*, 424 U.S. at 95 (presidential candidates who voluntarily accept the benefits of public financing must also "suffer a countervailing denial"). Privately financed Arizona candidates may spend as much as they can raise; publicly financed candidates may not spend more than the amount of the state grant. Privately financed candidates may spend freely from their personal funds; publicly financed candidates may spend only a very limited sum ($1000 for a statewide office). Privately financed candidates may accept private contributions throughout the campaign, in larger increments; publicly financed candidates may raise money only during a short window of time, only from individuals, and only in increments of $100 or less per person. Ariz. Rev. Stat. Ann. §§ 16-905(A)-(D), 16-941(A) and (B)(1), 16-945 (West 2006 & Supp. 2010).

In return for agreeing to this framework, publicly financed candidates receive a grant of government funds that spares them the need to raise money. But *Buckley* makes clear that neither the grant of government funds to a candidate, nor the prescribing of conditions (such as voluntary adherence to an expenditure ceiling) to be eligible for such funding, violates the First Amendment. 424 U.S. at 90, 92-93, 94-95; see *id.* at 57 n.65. And the Court in *Davis*, while distinguishing the Millionaire's

Amendment from the provisions that govern public financing of presidential campaigns, did not call that aspect of *Buckley* into question. See 554 U.S. at 739-740.

Thus, under the Arizona Act, publicly and privately financed candidates are simply subject to different sets of rules. Unlike Davis's opponent, who received "fundraising advantages" (554 U.S. at 739) in the form of discriminatory contribution and coordinated-expenditure limits *without* being subject to any countervailing disadvantage under the federal regulatory scheme, petitioners' publicly financed opponents must take the bitter with the sweet. As the Court emphasized in *Buckley*, "since any * * * candidate accepting public financing of a campaign voluntarily assents to a spending ceiling, [privately financed] candidates will be able to spend more in relation to the [publicly financed] candidates." 424 U.S. at 99. And although privately financed candidates must raise money in order to outstrip their opponents' spending, neither the Arizona Act as a whole nor the matching-funds provision in particular imposes any obstacle to that fundraising. See *id.* at 94-95 & n.128. Because other features of the Arizona Act work to petitioners' advantage, the formula used by the State to calculate its payments to petitioners' publicly financed opponents—*e.g.*, allowing a legislative candidate to spend $42,957 on a primary instead of $14,319, see State Resps. Br. 6 n.3—does not give those opponents the sort of discriminatory "fundraising advantage" that Davis's opponent could have received.

3. Arizona's use of a matching-funds approach to calculate the payments made to publicly financed candidates does not burden petitioners

Petitioners contend (AFEC Br. 32-35; McComish Br. 50-58) that the Arizona Act's matching-funds provision burdens their exercise of First Amendment rights because their own campaign spending (if it exceeds the amount of the State's initial grant) triggers additional state outlays to their opponents. That argument lacks merit. Providing additional funds to petitioners' opponents does not make petitioners' own speech any less effective; does not require petitioners themselves to fund or publicize their opponents' speech; and does not associate petitioners with their opponents' messages. The Act simply ensures that, when privately financed candidates raise the stakes, publicly financed candidates will be able to stay in the hand for at least a few more rounds.

a. Petitioners contend (*e.g.*, McComish Br. 55) that the Act "force[s] [them] to help disseminate [their opponents'] hostile views." Petitioners' analogy to compelled-speech cases is flawed because petitioners provide neither the money nor the medium for their opponents' message.

Some compelled-speech claims object to *funding* speech with which the plaintiff disagrees. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (cited in McComish Br. 52). Petitioners are not taxed to pay for matching funds, however, unless they voluntarily check a box on their tax returns. Ariz. Rev. Stat. Ann. § 16-954 (West 2006); cf. 26 U.S.C. 6096 (similar). And government appropriations, even from the general fund, would not constitute compelled speech in any event.

Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 559, 562-563 (2005).

In other such cases, the plaintiff is made to *convey* the speech with which he disagrees. See, *e.g.*, *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1, 11 n.7, 12-13 (1986) (plurality opinion) (utility forced to "carry" messages in its billing envelope, exclusively from "those who disagree with [utility's] views and who are hostile to [utility's] interests"); *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 257-258 (1974) (newspaper forced to print critical rejoinder contrary to its editorial judgment). This Court's decisions condemning such requirements are likewise inapposite here. "The compelled-speech violation in each of [the Court's] prior cases," including *Pacific Gas* and *Tornillo*, "resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Rumsfeld* v. *FAIR*, 547 U.S. 47, 63 (2006). Petitioners are not required to disseminate any opposing speech. Nor does the matching-funds procedure identify petitioners with their opponents' speech or otherwise obscure petitioners' message. Cf. *id.* at 65; *Johanns*, 544 U.S. at 564-566.

b. Petitioners also suggest (AFEC Br. 30) that the matching-funds provision cognizably injures them simply because the matching funds enable their opponents to engage in additional speech. That argument lacks merit.

Although petitioners' speech may be the but-for cause of their opponents' receipt of matching funds, that is always true when one speaker's words or actions prompt another to respond in kind. To treat additional speech as a First Amendment injury would contravene this Court's repeated admonitions that, where existing

speech is insufficient or potentially counter-productive, "the remedy [that should] be applied is more speech." *E.g.*, *Linmark Assocs., Inc.* v. *Township of Willingboro*, 431 U.S. 85, 97 (1977) (quoting *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *Meese* v. *Keene*, 481 U.S. 465, 481 (1987); see also *Republican Party* v. *White*, 536 U.S. 765, 795 (2002) (Kennedy, J., concurring) ("democracy and free speech are their own correctives"). Indeed, this Court has suggested that it is preferable for the government itself to engage in its *own* counter-speech rather than restrict the speech it finds objectionable. *Linmark Assocs.*, 431 U.S. at 97; *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 507-508 (1996) (opinion of Stevens, J.). And here, Arizona does not speak itself, but simply makes funding available, on a content- and viewpoint-neutral basis, for candidates to engage in their own speech. See note 11, *supra*; cf. *Board of Regents* v. *Southworth*, 529 U.S. 217, 233-234 (2000) (viewpoint-neutral program to "stimulate * * * expression" was consistent with the First Amendment even though funded with mandatory exactions).

Although electoral politics may be a "zero-sum" endeavor (AFEC Br. 30), one candidate's advertisement does not become less effective simply because a competing candidate also engages in effective electoral advocacy. Two advertisements by opposing candidates may be directed to, reach, and persuade entirely different audiences. And from the standpoint of First Amendment values, two advertisements certainly are preferable to none. Electoral competition is not a cognizable burden under the First Amendment.

II. THE ARIZONA ACT IS VALID UNDER EXACTING SCRUTINY

Because petitioners have not established any "severe" burden on their speech, the Act is subject not to strict scrutiny, but to the more flexible standard that this Court has termed "exacting scrutiny." Under that standard, the Act is valid because it bears a "'substantial relation'" to a "'sufficiently important' governmental interest." *Citizens United*, 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66).[12]

A. Arizona's Public-Financing Scheme Furthers Important Government Interests

In *Buckley*, this Court recognized that public financing of candidate campaigns, by obviating the need for candidates to raise funds from private sources, combats both corruption and the appearance of corruption by "eliminating the improper influence of large private contributions." 424 U.S. at 96. This Court has repeatedly held that the government's interest in preventing actual and apparent corruption is not simply important, but compelling. *See, e.g.*, *NCPAC*, 470 U.S. at 496-497. Petitioners contend (AFEC Br. 55-56; McComish Br. 68-71), however, that the Arizona Act's matching-funds provisions are not substantially related to an important gov-

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[12] In *Buckley*, the Court suggested that a claim that a public-financing system invidiously discriminates might be reviewed under a more permissive standard because public financing "is not restrictive of voters' rights and [is] less restrictive of candidates'" rights than are ballot-access regulations that have been reviewed under exacting scrutiny. 424 U.S. at 94. The Court did not resolve that question, but upheld the Presidential Primary Act and Presidential Fund Act as furthering "sufficiently important governmental interests." *Id.* at 95. The Court can do the same here.

ernment interest because Arizona's contribution limits separately eliminate any meaningful danger of corruption. That argument lacks merit.

1. States are not free to set contribution limits as low as they may think necessary to combat corruption. A contribution limit may be struck down as unduly low if it "prevent[s] candidates from 'amassing the resources necessary for effective [campaign] advocacy.'" *Randall*, 548 U.S. at 248 (opinion of Breyer, J.) (second brackets in original); see *id.* at 248-249. That Arizona has limited contributions to a particular dollar amount does not mean that no continuing risk of corruption exists.

As petitioners note (McComish Br. 75-76), moreover, a single individual can "bundle" many contributions together. And an effective Arizona campaign may raise and spend significant sums. Petitioners presented in support of their stay application the declaration of a 2010 gubernatorial candidate that he planned to raise and spend more than $1 million, see J.A. 995; the amount of the initial grant to publicly funded gubernatorial candidates for the 2010 primary election was $707,447. State Resps. Br. 6 n.3. In the 2002 gubernatorial election, one candidate raised and spent more than $2 million. See Matt Salmon for Governor, *2002 Post-General Election Report* (Dec. 5, 2002), http://www.azsos.gov/cfs/PublicReports/2002/94398CFF-CA9F-4BF0-B9C0-746A1E3D6D95.pdf. Petitioners cannot plausibly claim that the raising of such significant sums entails *no* possibility of a candidate's exchanging contributions for favors.

2. The Court in *Buckley* upheld *both* the limits on contributions to federal candidates, see 424 U.S. at 23-37, *and* the provisions that authorize public financing of presidential campaigns, see *id.* at 90-108. The Court

observed that, even under campaign-finance laws that limit the amount of money a candidate can receive from any single source, candidates still face "the burden of fundraising." *Id.* at 96. Indeed, contribution limits increase "the rigors of soliciting private contributions" by requiring candidates to raise funds from a greater number of donors. *Ibid.* In addition to reducing the danger of actual or apparent corruption, public financing relieves candidates of "the burden of fundraising," thereby freeing them to focus on issues of public concern. See *id.* at 95-96. *Buckley* makes clear that Arizona's adoption of contribution limits does not prevent it from also offering voluntary public financing, both to further reduce the danger of corruption and to obviate the need for participating candidates to spend time soliciting private donations.

B. The Matching-Funds Provision Is An Integral And Constitutionally Permissible Component Of The Arizona Act

Under exacting scrutiny, the State need not show that the matching-funds provision is the *only* way to effectuate its interest in preventing corruption, or that it is the *narrowest* way. Cf., *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 556 (2001) (no least-restrictive-means test under intermediate scrutiny); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989) (same). Rather, it need only show that it is a *valid* way. As the court of appeals correctly held, the State has satisfied that requirement.

1. A necessary component of any public-financing scheme is a formula for determining the amount of money that each participating candidate will receive. In order for Arizona's voluntary public-financing regime to

attract participants, and thereby achieve the State's important purposes, those amounts must be high enough to give candidates reasonable confidence that they will be able to run competitive campaigns. See Pet. App. 36 ("A public financing system with no participants does nothing to reduce the existence or appearance of *quid pro quo* corruption."). Matching funds provide that assurance. See, *e.g.*, State Resps. Br. 54-55; Clean Elections Inst. Resp. Br. 47-48. Although the State could also provide the requisite assurance simply by paying out very large sums to all candidates who satisfy the statutory requirements, that approach would waste public funds in the many elections where such large grants are unnecessary either to enable candidates to run effective campaigns or to persuade them to elect public financing. See Pet. App. 37 ("[I]f the Act were to raise the amount of its lump-sum grants and do away with matching funds altogether, it would make the Act prohibitively expensive and spell its doom.").

The matching-funds provision is thus an appropriately tailored way of making the public-financing scheme attractive to candidates, thereby enabling the system to achieve its important purposes, without unnecessarily burdening the public fisc. Petitioners acknowledge (McComish Br. 84-85) that the State could constitutionally give participating candidates the maximum amount of funding in a single lump-sum payment at the outset, instead of one-third at the outset and the remaining two thirds in matching funds, when triggered. But if the State can make the program just as effective and attractive, and encourage just as much participation, while spending less money on hopeless candidacies or uncompetitive races, that is *better* tailoring, not worse.

2. There is likewise no merit to petitioners' contention (AFEC Br. 35-43; McComish Br. 64) that the Arizona Act's matching-funds provision runs afoul of a perceived constitutional ban on state efforts to "equalize" political expression. To be sure, this Court has rejected the proposition "that a candidate's speech may be restricted in order to level electoral opportunities." *Davis*, 554 U.S. at 742 (internal quotation marks omitted); see *Buckley*, 424 U.S. at 48-49, 56-57. Arizona therefore could not limit a privately financed candidate's campaign expenditures in order to produce parity of resources as between that candidate and his publicly financed opponent. But neither the Act as a whole nor its matching-funds provision imposes any restriction on petitioners' own spending.

So long as the State does not restrict private speech, it is not foreclosed from all efforts to ensure that candidates who elect public financing can have approximately the same electoral opportunities as those who do not. In *Buckley*, for example, the Court upheld Congress's decision to provide equal funding to the presidential candidates of both major parties, regardless of the relative performances of the two parties in the most recent election. See 424 U.S. at 98 n.133. In particular, nothing in this Court's decisions supports the counter intuitive proposition that a State, in calculating the amounts to be paid to candidates who have chosen to participate in the State's public-financing system, cannot use as a benchmark the sums raised and spent by participants' privately financed opponents.

In devising a payment formula, Arizona can reasonably seek to provide funding that is sufficient, but not greater than necessary, to allow participating candidates to run competitive campaigns. And the most obvi-

ous measure of the amount necessary to be competitive is the amount being spent by competitors. If Arizona had chosen to provide the same level of funding to all participating Senate candidates, it could surely have calculated the appropriate amount by reference to the *average* cost of prior privately financed Senate campaigns. The First Amendment does not prevent the State from using the more nuanced matching-fund mechanism, which recognizes that the cost of an effective campaign depends in part on the circumstances of a particular election.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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